(1)

91-1648

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

MAJOR JIM ROBERTS AND COUNCILPERSONS TERRY SCOTT, JOYCE GILLARD, VIOLET RAGLAND, TRUMAN CRANE AND BILL PARRISH, IN THEIR OFFICIAL CAPACITIES AS THE DULY ELECTED OFFICERS OF THE TOWN OF MORRIS, ALABAMA,

Cross Petitioners,

v.

JIM JOINER; JOHN MILNER

Cross Respondents.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

C. PETER BOLVIG
Counsel of Record
McDaniel, Hall, Conerly & Lusk, P.C.
Suite 1400 Financial Center
505 North 20th Street
Birmingham, AL 35203
(205) 251-8143

Attorney for Cross Petitioners

BEST AVAILABLE COPY

28

QUESTION PRESENTED

Whether the statements made by the Officers is speech protected by the First Amendment of the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption. The presently listed mayor and council members of the Town of Morris are parties to this action in their official capacities only, as the duly elected representatives of the Town. They were substituted for the originally-named mayor and council members when the originally-named officials of the Town left office after the commencement, and during the pendency, of the proceedings below. A.1.

This action was instituted against the following originally-named elected representatives in their official capacities only: Mayor Lamar Reid and council members Gene Chambers, Ed Reno and Charlie Lollar. The suit also originally named council members Earl Peyton and Frank Keith as Defendants in their official and individual capacities. The Petitioners later voluntarily dismissed Peyton and Keith in their individual capacities after their deaths.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURSIDCTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 15

I. The Alabama Supreme Court Opinion in this case conflicts with decisions of the United States Supreme Court and several of the United States Courts of Appeals insofar as the Opinion holds that the Officers' speech was protected by the First Amendment 15

CONCLUSION 23

TABLE OF AUTHORITIES

Cases: *Page*

Cooper v. Johnson, 590 F.2d 559 (4th Cir. 1979) 18

Elrod v. Burns, 427 U.S. 347 (1976) 16

Hoopes v. Nacrelli, 512 F.Supp. 363 (E.D. Pa. 1981) 19, 20, 22

Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977) 18, 19

Magri v. Giarrusso, 379 F.Supp. 353 (E.D. La. 1974) 21

Morales v. Stierheim, 848 F.2d 1145 (11th Cir. 1988), cert. denied, 489 U.S. 1013 (1989) 17, 18

Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 15

Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563 (1968) 15, 16, 17, 21

Rankin v. McPherson, 483 U.S. 378 (1987) 16

Roberts vs. Joiner, 590 So. 2d 195 (Ala. 1991) 15, 22

Wood v. Town of Frederica, 529 F.Supp. 403 (D. Del. 1982), aff'd, 688 F.2d 828 (3rd Cir. 1982) 19

OPINIONS BELOW

The September 6, 1991 Opinion of the Alabama Supreme Court is reported at 590 So. 2d 195 (Ala. 1991), and is reprinted at A.1-19. The November 8, 1991 decision of the Alabama Supreme Court denying, without opinion, the Officers' application for rehearing is also reported at 590 So. 2d 195 (Ala. 1991). A.1. The November 16, 1990 order of the Trial Court, entering judgment on behalf of the Officers, is not reported and is reprinted at A.20-25.

STATEMENT OF JURISDICTION

The decision of the Alabama Supreme Court issued on September 6, 1991 became final, for purpose of review by this Court, on November 8, 1991 when the Alabama Supreme Court denied, without opinion, the Officers' application for rehearing. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Officers' application to extend the time for filing their petition for writ of certiorari was received by this Court on January 28, 1992. The addendum to the Officers' application was received by the Court on January 30, 1992. On February 4, 1992 the Court extended the time for filing the petition for writ of certiorari to, and including, March 12, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).A.57.

The Cross Petitioners were served with a copy of the original Petition for Writ of Certiorari on March 12, 1992. This Cross Petition is filed pursuant to United States Supreme Court Rule 12.3, and this Cross Petition is timely filed, having been filed within thirty (30) days after receipt of the original Petition for Writ of Certiorari (Docket Number 91-1497). However, this Cross Petition for Writ of Certiorari is only due to be granted if this Court grants the original Petition for Writ of Certiorari.

STATUTES INVOLVED

This Cross Petition for Writ of Certiorari involves U.S. Const. amend. I which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free speech thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Jim Joiner, was employed as the police chief for the Town of Morris. John Milner, was employed as a sergeant on the Town of Morris police force. Hereinafter, they will be referred to as "Joiner", "Milner" or referred to collectively as "the Officers". The Officers' employment was subject to the terms and conditions of the "Town of Morris Personnel Policy". (R.T. 223; Plaintiffs' Exhibit 6).

At the time of the incidents made the basis of this lawsuit, the Town Council for the Town of Morris was comprised of the following individuals: Earl Peyton, Gene Chambers, Ed Reno, Charlie Lollar, Frank Keith and Lamar Reid (Mayor of the Town of Morris). These individuals were elected to their positions and received $5.00 a month in compensation for serving as Councilmen. (R.T. 592). Hereinafter, the Councilmen will be referred to individually by their last names or collectively as "the Council" or "the Councilmen".

In October of 1983, Mayor Reid prepared a proposed budget for the following fiscal year (1984). (R.T. 189, 471-473.) Joiner was involved in the preparation of the budget with Reid and had input into its contents. (R.T. 190-191). The proposed budget for 1984 included substantial salary raises for the Officers, and Joiner was to be awarded a newly created position of Administrative Assistant. (R.T. 190). The Administrative Assis-

tant position would pay an additional salary in the range of $3,000.00 to $5,000.00. (R.T. 594-595).

The proposed 1984 budget was rejected by the Council. (R.T. 191). The 1984 budget that was ultimately passed did not include the Administrative Assistant position for Joiner, and the proposed raises for the Officers and other Town employees were reduced to 12%. (R.T. 192).

After Reid's proposed 1984 budget did not pass, the Officers discovered that two members of the Council (Peyton and Keith) had purchased tires for their personal vehicles through the Town's account. (R.T. 473-474). Buying tires through the Town's account allowed the individuals to take advantage of the Town's discount, thereby, allowing the individuals to buy the tires at below retail price. The Officers claim that Milner discovered the invoices reflecting that tires had been purchased through the Town's account, and he showed the invoices to Joiner. (R.T. 192-193).

In early December of 1983, Joiner took the invoices and showed them to Mayor Reid. (R.T. 193). Joiner testified that he turned this matter over to the Mayor, because he felt that was the proper means for handling the situation. (R.T. 193). The invoices reflect that Peyton and Keith purchased tires through the Town's account. (Plaintiffs' Exhibit 1 through Plaintiffs' Exhibit 5). In addition to the two Councilmen, however, the invoices also reflect that Bobby Keith, the son of Frank Keith, purchased tires through the Town's account. (R.T. 248). Bobby Keith was not and has never been a member of the Council. (R.T. 248).

Keith and Peyton subsequently took the matter themselves to the Ethics Commission in Montgomery, Alabama and to the Jefferson County District Attorney's office. (R.T. 597). They were informed that the matter should be resolved internally by the Town Council. (R.T. 597).

On December 17, 1983, a Saturday, late at night, the Officers called Keith, Peyton, Lollar and Reno at their homes and asked them to come to the Town Hall. (R.T. 76-77, 193-194).

The Officers called this meeting to confront Keith and Peyton with the ire situation, and Milner initially informed Keith that he was going to read Keith his rights. (R.T. 78, 194). The meeting generally accomplished nothing, except upsetting the individuals involved. (R.T. 195). The Officers did not consult with Mayor Reid before calling the Councilmen to the Town Hall, nor was Mayor Reid advised of the same in advance of said meeting. (R.T. 194).

It is noteworthy that the Officers never made any attempt to question or otherwise pursue Bobby Keith (the non-Councilman) about his purchase of tires. (R.T. 76-77, 193-194).

The next day, on December 18, 1983, the Council met in special session to arrive at a solution to the tire situation. (R.T. 195-196). Generally, the Council agreed that the solution to the problem was to have Peyton and Keith pay the difference between the Town discount and the retail price of the tires, and Peyton and Keith would not approve anymore purchase orders on behalf of the Town of Morris. (R.T. 596; Joint Exhibit 3). Following this meeting, Mayor Reid advised the Officers that the Council had handled the situation, and this was to be the end of the matter. (R.T. 359).

Also, around this same time, there was an incident involving the viewing of some "x-rated" movies in the police department. According to Joiner's testimony, he was in the police office when several unidentified individuals began watching the "x-rated" movies. (R.T. 247-248). Once the movies began, and Joiner saw that they appeared to be "x-rated", he left the office without taking any action to prohibit the viewing of the same. (R.T. 247-248). Subsequent to the viewing of the movies, Mayor Reid became aware of the incident, and in December of 1983, he posted a note on the police office door stating that no further viewing of "x-rated" movies would be allowed within the department. (R.T. 237).

Subsequent to the rejection of Mayor Reid's proposed 1984 budget, the relationship between the Officers and the Council deteriorated substantially as exemplified by the evidence.

After the proposed budget was rejected, Chambers attempted to talk to Joiner about the various events, but Joiner refused to talk to Chambers responding that he did not have "a damn thing to say" to Chambers. (R.T. 618-619).

During this same time frame, Chambers complained that the Officers were not actively patrolling his skating rink business located in the Town of Morris. There had been no problems patrolling his business before the rejection of Mayor Reid's proposed budget. (R.T. 618-619).

Following the rejection of Mayor Reid's proposed 1984 budget, there was an occasion where Chambers was approached by Milner, and Milner asked if he could discuss some of the events with Chambers. Chambers noted that there appeared to be something irregular on Milner's person, and when he asked Milner about it, Milner produced a tape recorder from his pocket. Chambers suspected that Milner intended to record the conversation. (R.T. 623-624).

There was also an incident in this time frame in which Joiner borrowed Milner's tape recorder and recorded a telephone conversation with Mayor Reid. (R.T. 205-206). Milner knew that Joiner intended to tape Reid's conversation. (R.T. 205-206). Joiner discussed the problems with Reid during the conversation and recorded the same without Reid's knowledge or permission. (R.T. 205-206).

The deterioration of the relationship between the Council and Officers is further exemplified by the fact that the Officers took the position that they were under no obligation to cooperate with Keith or follow his directives. (R.T. 238-240, 338). This is significant, because Keith had been appointed by Mayor Reid as the Councilman responsible for overseeing the operations of the police department. (R.T. 602).

Joiner's own realization of the deterioration of the relationship is exemplified by his testimony that as early as December, 1983, Joiner feared that his job was in jeopardy. (R.T. 234).

On December 27, 1983, the Town Council met in regular session. All Councilmen were present except Reno and Lollar.

(Joint Exhibit 4). At this meeting, the November Financial Statement was distributed, and Mayor Reid discussed the financial strain that was afflicting the Town. A motion was made that the Town borrow $8, 500.00 on a ninety-day note to cover payroll expenses. (R.T. 599; Joint Exhibit 4). The motion was unanimously approved by the Councilmen in attendance. (Joint Exhibit 4).

Around the first of 1984, Keith decided to alter the work schedules within the Police Department. (R.T. 620). Both of the Officers resented these schedule changes, and both openly complained that the changes were in retaliation for their involvement in the tire situation. (R.T. 237, 620).

The Council next met in regular session on January 10, 1984. (Joint Exhibit 5). All Councilmen were present with the exception of Lollar. (Joint Exhibit 5). At this meeting, the financial status of the Town was discussed, and a motion was made to lay off Jimmy Traywick (the dispatcher), demote Frankie Witt (a police officer) to the dispatcher position, cut all regular full-time employees' salaries 5%, and thereafter make an in-depth study of finances every thirty days. (R.T. 599; Joint Exhibit 5). The motion was approved by all Councilmen present with the exception of Mayor Reid who voted against it. (R.T. 199, 600; Joint Exhibit 5).

It is noteworthy that the Council's actions affected several individuals who were not involved in the tire situation. Traywick was laid off, Witt was demoted, and the 5% pay cut applied to the City Clerk, Anna Grooms. (R.T. 195-197).

It is also noteworthy that the 5% pay cut, when applied to the previous 12% raise, still left the Officers with a net 7% raise over their 1983 salaries. (R.T. 241).

At the January 10, 1984 Council meeting, the Councilmen present also unanimously approved the use of daily shift reports, and approved the practice of policemen logging in and out of service with the dispatcher and/or clerk while on duty. (Joint Exhibit 5). Chambers explained that he voted in favor of the additional reporting, because there was a perceived

need to know where the policemen on duty were at any given time for safety reasons. (R.T. 601-602). A copy of the "Daily Shift Report" and the directive regarding logging in and out of service are attached to the minutes for the January 10, 1984 Council Meeting. (Joint Exhibit 5).

The Officers resented the pay cut and the directives and voiced their opinions that these actions by the Town Council were in retaliation for the Officers' involvement in the tire situation. (R.T. 582, 602-603, 620-621).

The Council next met in regular session on January 24, 1984. (Joint Exhibit 6). All Councilmen, the Officers, members of the public and the press were present at this meeting. (R.T. 201, 325, Joint Exhibit 6). Without any forewarning, Joiner stood up in the Council meeting, before the Council, the members of the public present and the press, and read a letter to the Council stating that the recent pay cuts and layoffs were in retaliation for the tire situation. (R.T. 200; Joint Exhibit 6). Joiner knew that the press was present when he read his letter in the meeting. (R.T. 201). Joiner did not advise anyone, including the Council members, that he intended to read the letter prior to reading the same, nor did he show anyone a copy of the letter prior to reading the same in the Council meeting. (R.T. 201).

The Council next met in regular session on February 14, 1984. (Joint Exhibit 7). All Council members were present except Keith and Chambers. (Joint Exhibit 7). Near the end of this meeting, Mayor Reid called upon the members of the public present for any comments concerning the Town, and Milner's wife questioned the Town spending money on the ball park after cutting employees' (including her husband's) salaries. (Joint Exhibit 7). Mayor Reid explained that the money used for the ball park was derived from a revenue sharing program, and that money was specifically earmarked for the ball park and senior citizen activity. (Joint Exhibit 7).

The Council next met in regular session on February 28, 1984. (Joint Exhibit 8). During this meeting, Chambers ques-

tioned the Town's paying for full family medical coverage for Joiner. (Joint Exhibit 8). In response to the previous discussions about the financial status of the Town, Chambers requested Keith to provide Chambers with a full breakdown of the expenses within the police department (Keith was in charge of the Police Department). (R.T. 607-609). When Chambers reviewed the detailed breakdown, he discovered that the Town was paying for full family medical insurance for Joiner. (R.T. 607-609). Chambers recalled that in the January 26, 1982 meeting the Council voted to provide only single coverage health insurance for new employees, effective January 26, 1982. (R.T. 482, 593-594; Joint Exhibit 1). Since Joiner resigned from his position in February of 1982 and was subsequently rehired in March of 1982, Chambers took the position that the Town should not provide him with full family medical insurance. (Joint Exhibit 2, Joint Exhibit 8, Defendants' Exhibit 3). All Councilmen, except Mayor Reid and Lollar, voted in favor of only paying for Joiner's individual medical insurance. (Joint Exhibit 8). Lollar and Reid voted against cutting Joiner's insurance benefit. (R.T. 200, 481)

Subsequent to the action of the Council cutting Joiner's insurance benefit, the Officers again raised the tire situation and accused all Council members of cutting Joiner's insurance benefit in retaliation for the tire incident. (R.T. 582, 621).

Either the last day of February, 1984 or the first day of March, 1988, Joiner moved out of the Town of Morris to Jasper, Alabama. (R.T. 180-181). Joiner explained that he moved and his wife took a job at this time because it was apparent to him that he was going to be terminated. (R.T. 183-184).

The Town Council next met in regular session on March 13, 1984. (Joint Exhibit 9). All Council members were present. (Joint Exhibit 9). During this meeting, Mayor Reid read and discussed "Resolution Number 84-3", which was unanimously approved by the Council. (Joint Exhibit 9). "Resolution Number 84-3" stated as follows:

> WHEREAS, the Council of the Town of Morris recognizes publicly that there is a problem existing between the Police Dept. and the Council members.
>
> WHEREAS, the Council wants to try to resolve the problems as it is detrimental to the operation of the Town.
>
> WHEREAS, the Council is giving two weeks to work the problems out and if a solution cannot be settled on, then the Council will have to resolve the matter at the next Council meeting.

(Joint Exhibit 9). Joiner and Milner were present at this meeting and heard the Mayor read the Resolution. (R.T. 201-202, 326). The Officers also once again heard the Councilmen discuss the problems between the Council and the Officers. (R.T. 201-202).

After Mayor Reid read "Resolution Number 84-3", and it was unanimously adopted by the Council, Milner asked Mayor Reid to explain the Resolution. (R.T. 327; Joint Exhibit 9). Reid explained that the Council was willing to meet with the Officers within the next two weeks to get any input that the Officers had into finding a solution to the problems, but if no solution was reached by the next Council meeting, then the Council would bring their own solution to the table. (R.T. 327-328; Joint Exhibit 9). The Council agreed to set a meeting date with the Officers to discuss the problems. (Joint Exhibit 9). Milner was not satisfied with Mayor Reid's explanation. (R.T. 328).

On March 15, 1984, the Officers and the Council met in special session to discuss settling the problems that had arisen between the Officers and the Council. (R.T. 202; Joint Exhibit 10). The minutes of the meeting reflect that many problems were discussed by the Council and the Officers including the following: (1) the business of the Town was not being handled properly; (2) there was a lack of cooperation between the Officers and the Council; (3) chief Joiner moved out of town to Jasper; (4) Joiner acquired an unlisted phone number at

home; (5) Joiner would not answer telephone calls; (6) the Officers failed to get the anticipated raise in salary; (7) bringing television media to the Council meetings was wrong; (8) the tire situation was handled wrong; (9) the Mayor should have handled the tire situation in its entirety; (10) the salary cuts were justified and in the best interest of the Town; (11) the method for preparation and approval of the 1984 budget should have been handled differently; (12) feelings were hurt on both sides; (13) misunderstandings and misinformation were contributing to the problems between the Council and the Officers, and (14) a new procedure needed to be devised for following up on outstanding bonds from court work. (Joint Exhibit 10). Joiner admits that during this meeting he advised the Council that he would not be satisfied under any circumstances until he got back his 5% raise and his full family insurance benefits, and he further stated that the problems between the Council and the Officers were not going to go away until he got them back. (R.T. 129, 204-205). Milner claims that he was told to sit down and shut up during the course of this meeting. (R.T. 204, 239). Notably, this is the only meeting where Milner claims he was prevented from speaking, and Joiner does not claim that he was ever prevented from speaking. (R.T. 331). The Councilmen deny that the Milner was ever told to sit down and shut up at any meeting, including the March 15, 1984 meeting. (R.T. 488, 613). During this meeting, the Officers did not advise the Council that they intended to file a lawsuit against the Council members in the near future. (R.T. 206).

On March 23, 1984, eight days following the special session, the Officers filed suit against the Council. (R.T. 206; Defendants' Exhibit 1). The Officers' Complaint named each and every one of the Council members in their official capacities and also named Keith and Peyton in their individual capacities as well. (Defendants' Exhibit 1). The Complaint alleges that the pay cuts, reduction of Joiner's insurance benefits, scheduling changes and other changes within the police de-

partment were done in retaliation for the Officers' involvement in the tire situation. (R.T. 207-208; Defendants' Exhibit 1). The Complaint states four counts, each seeking $250,000.00 in damages against each and every one of the Council members regardless of whether the individual Council member had voted in favor of the Officers on any particular issue or whether the individual Council member was even present at any particular meeting. (R.T. 206-207; Defendants' Exhibit 1).

The Council next met in regular session on March 27, 1984. (Joint Exhibit 11). All Council members and the Officers were present at this meeting. (R.T. 613-614; Joint Exhibit 11). During the course of this meeting, the problems between the Officers and the Council were again discussed, and Reno, Chambers and Peyton all made comments regarding the same. (R.T. 330-331,614; Joint Exhibit 11). The Officers were present during this meeting and were given an opportunity to respond, but Milner made no comment. (R.T. 330, 316-314).

Immediately following the regular session on March 27, 1984, the Council met in a special session to further discuss a resolution to the problems between the Officers and the Council. (Joint Exhibit 11). During this meeting, the Council discussed the fact that they had previously agreed to give the Officers two weeks to work out the problems, and if no agreement was reached between the parties, then concrete action was to be taken at the March 27, 1984 regular session. (Joint Exhibit 11). The Council noted that no agreement had been reached between the parties, and since their last meeting, the Officers had filed their previously referenced lawsuit. (Joint Exhibit 11). The Council further discussed that the situation between the Council and the Officers was hindering the ability to give the Town the services it deserved. (Joint Exhibit 11). At the conclusion of this meeting, the Council agreed to meet again on March 29, 1984 to make a final decision about what action to take to end the problems between the Council and the Officers. (Joint Exhibit 11).

The Council next met in special session on March 29, 1984 for the purpose of arriving at a solution to the problems existing between the Officers and the Council. (Joint Exhibit 12). Prior to this meeting, Joiner heard that the Council had made up its mind to terminate him at this meeting. (R.T. 235). All Council members and the Officers were present at this meeting. (R.T. 210-211; Joint Exhibit 12). News reporters and television cameras were also present at this meeting. (R.T. 216, 618).

Mayor Reid opened the meeting by explaining that the purpose of the meeting was to resolve the conflict between the Officers and the Council. (Joint Exhibit 12). He explained that the matter was open for discussion, and any and all opinions on the subject would be welcomed. (Joint Exhibit 12). He advised that Council members would speak first and then anyone else could speak. (Joint Exhibit 12). During this meeting, the Councilmen stated that they had met with the Officers in an attempt to work things out, but it now appeared that any decision made by the Council members would be overshadowed by the threat of a lawsuit, and the day-to-day business of the Town was not being properly conducted as a result of the deteriorated relationship between the Council and the Officers. (Joint Exhibit 12). While Keith and Peyton were in attendance at this Council meeting, neither made any comment during the course of the same. (R.T. 215; Joint Exhibit 12).

During the meeting, several citizens spoke on the subject of varying complaints. (R.T. 211, 333; Joint Exhibit 12). Generally the citizens backed the Council, did not like the adverse publicity that the Town had received as a result of the way the Officers had handled the tire situation and objected to the showing of x-rated movies in the police department. (R.T. 333-334; Joint Exhibit 12).

During this meeting, both Officers were present and given an opportunity to respond to the varying complaints. (R.T. 615).

Mayor Reid read a statement concerning the matter, stating that the situation had severely hampered the day-to-day operation of the Town's business, and that in light of the situation, he recommended the Officers resign. (Joint Exhibit 12). He further recommended that the Officers should be terminated if they chose not to resign. (Joint Exhibit 12).

Mayor Reid called upon the Officers to make any comments or present their side of the story. (R.T. 216). Joiner responded that he would not resign, because he had done nothing wrong. (R.T. 222). Milner's only comment was that he would not resign, although his wife was present and did speak out in defense of her husband. (R.T. 211, 334).

After the Officers refused to resign, the Council voted to adopt the Resolution of Mayor Reid. All Councilmen voted in favor of terminating the officers with the exception of Keith and Peyton who abstained from voting. (R.T. 222, 338; Joint Exhibit 12).

The Council members who voted in favor of the termination were in no way involved in the tire incident. (R.T. 223). Furthermore, Chambers, who voted in favor of termination, testified at trial that he did not get along with Peyton and Keith anyway, and they would not have been able to influence his vote. (R.T. 592, 624-625).

Following their termination, the Officers had a right to a post-termination hearing under the "Town of Morris Personnel Policy". (R.T. 584; Plaintiffs' Exhibit 6). The Officers were sent letters advising them that their termination would be effective immediately, and that the grounds for their dismissal were those stated in the previous meeting. (R.T. 224; Defendants' Exhibit 4). The letter further advised them that a more detailed statement of the charges would be made available upon request. (Defendants' Exhibit 4).

Neither of the Officers requested a more detailed list of charges, nor did they seek any post-termination hearing as provided for under the "Town of Morris Personnel Policy". (R.T. 226, 623). It is noteworthy that Frankie Witt, the officer

who was demoted to dispatcher, was represented by the same attorney that represented Joiner and Milner. (R.T. 622-623). Subsequent to the adverse action by the Council, Witt requested a post-deprivation hearing under the Personnel Policy. (R.T. 622-623). Witt, who was represented by the same attorney representing the Officers, was given a post-deprivation hearing in accordance with the "Town of Morris Personnel Policy" on January 26, 1984. (R.T. 622-623; Joint Exhibit 6).

Instead of seeking a post-termination hearing under the "Town of Morris Personnel Policy" the Officers merely amended their Complaint to allege that, in addition to the previous actions of the Council, the Council's termination of the Officers was in retaliation for the Officers' involvement in the tire situation. (R.T. 226, 623; C.R. 15).

The case proceeded to trial on June 18, 1990. (R.T. 1).

The Trial Judge denied the Councilmen's Motion for Directed Verdict both at the close of the Plaintiffs' case and at the close of all evidence. These motions raised and properly preserved the issue presented in this Cross Petition. (R.T. 413-469, 713-722; C.R. 247-250).

The jury subsequently returned a verdict in favor of the Officers in the amount of $100,000.00 each in compensation for the Officers' mental anguish and damage to reputation. (C.R. 285-288).

The Defendants filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial or in the Alternative, Motion for Remittitur. This motion again raised and properly preserved the issue in this Cross Petition (C.R. 291-298). The Trial Judge entered an Order on November 19, 1990 denying the Defendants' Post-Trial Motions, awarding Joiner an additional $25,430.00 for lost wages and lost insurance premium benefits, awarding an additional $39,034.06 to Milner for lost wages, and ordering reinstatement of Milner. (C.R. 367-373).

At the trial of this case, the Trial Judge allowed the Officers' claim that their pay was cut, that Joiner's family insurance benefits were reduced, that the Officers were terminated and that the Officers suffered other retaliatory conduct all in violation of their First Amendment right to free speech to go to the jury. The Cross Petitioners have consistently, at every stage in this litigation, contended that the Officers' speech is not protected under the First Amendment.

This issue was again raised and properly preserved in the appeal to the Alabama Supreme Court. *Roberts vs. Joiner*, 590 So. 2d 195, 198 and 201-202 (Ala. 1991).

The Alabama Supreme Court held in its Opinion in this case that the Officers' speech is protected under the First Amendment of the United States Constitution. *Roberts*, at 201-202.

REASONS FOR GRANTING THE WRIT

I. The Alabama Supreme Court Opinion in this case conflicts with decisions of the United States Supreme Court and several of the United States Courts of Appeals insofar as the Opinion holds that the Officers' speech was protected by the First Amendment.

The Officers had the initial burden of proof with respect to the First Amendment claims. The Officers must have initially proved that the subject speech is protected by the First Amendment. *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Whether the Officers' speech is protected by the First Amendment is to be determined by the Court as a matter of law. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968).

In determining whether the Officers' speech is protected under the First Amendment, the Court must weigh competing interests. The Court must attempt to balance the interest of the employee, as a citizen, in commenting upon matters of

public concern versus the interest of the State, as an employer, in promoting efficiency of public services. *Pickering*, at 568. If the statements made by the employee are such that they would affect the working relationship between the employee and his supervisors, the State has a legitimate interest in prohibiting that speech. The exercise of such speech could deteriorate the working relationship between the employee and his supervisor, thereby, hampering the services to be provided to the public. In such a case, the employee's speech will not be protected by the First Amendment, even though First Amendment rights might be affected. *Pickering*, at 569-570.

Whether the subject speech is protected by the First Amendment is an issue of law which is reviewable de novo on appeal. *Rankin v. McPherson*, 483 U.S. 378, 385-386 (1987).

There are several cases which demonstrate that the Alabama Supreme Court's Opinion in this case conflicts with legal precedent from the United States Supreme Court and the United States Courts of Appeals.

In *Elrod v. Burns*, 427 U.S. 347 (1976), the United States Supreme Court held that certain non-civil service employees of the Cook County, Illinois Sheriff's Office could be discharged for failure to affiliate with the political party of the current sheriff. The Court noted that the right to associate with a political party of one's choice was a basic constitutional right protected by the First and Fourteenth Amendments. *Elrod*, at 357. However, the Court went on to hold that "prohibition on encroachment of First Amendment protections is not an absolute." *Elrod*, at 360. The Court noted that "one interest which has been offered in justification of patronage is the need to ensure effective government and the efficiency of public employees." *Elrod*, at 364. The Court then weighed the competing interests and concluded that employees in policy making positions could be discharged for failure to affiliate with the current sheriff's political party. The justification for this obvious infringement on First Amendment rights was that the interest of the State in providing efficient services to the

public outweighed the individual's First Amendment right to associate with the political party of his choice.

The 11th Circuit has recognized that criticism of a supervisory employee may not be protected by the First Amendment. In *Morales v. Stierheim*, 848 F.2d 1145 (11th Cir. 1988), cert. denied, 489 U.S. 1013 (1989), Morales, a community development planner, accused the Chairman of the Community Development Board of various things, including: (1) that the Chairman lied; (2) that the chairman had requested kickbacks from Morales, and (3) that the Chairman used disruptive tactics. The Trial Court found that Morales' statements involved matters of public concern, and the jury returned a verdict in favor of Morales. On appeal, the 11th Circuit examined the statements made by Morales. The threshold issue addressed by the 11th Circuit was whether the statements addressed a public concern. The 11th Circuit concluded that the statements did address a public concern and then turned to the balancing process as outlined in *Pickering*. In analyzing the competing interests, the 11th Circuit stated:

> We must consider several factors in balancing the State's interest in efficient provision of public services against Morales' speech interest, including: (1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made. *Connick*, 461 U.S. at 151-55, 103 S.Ct. at 1692-94; *Ferrara*, 781 F.2d at 1513.
>
> State interests weigh heavily where an employee's speech thwarts the mission of the agency or impedes the performance of the speaker's duties. Also, where an employee's speech has a detrimental impact on close working relationships or destroys harmony among co-workers, "a wide degree of deference to the employer's judgement is appropriate." *Connick*, 461 U.S. at 151-52, 103 S. Ct. at 1692.

> Morales' statements frustrated the pursuit of community development goals in Melrose by effectively cutting off communication between Melrose Board and OCDE.
>
> . . .
>
> The most damaging effect of Morales' statements on the governmental interest was the destruction of the necessarily close working relationship between Barrios (the Chairman) and Morales.

Morales, at 1149-50.

More particularly, several courts have examined situations almost identical to the situation in the case at bar, and have concluded that statements made by law enforcement officers critical of their supervisors are not protected under the First Amendment.

In *Cooper v. Johnson*, 590 F.2d 559 (4th Cir. 1979), the Court held that the sheriff did not violate a deputy sheriff's First Amendment Rights when the sheriff discharged the deputy for drafting a letter to the editor of a local newspaper. The letter in question stated that a former news article was inaccurate when it led the public to believe that the conclusion of a case was the result of one officer's efforts. The deputy pointed out in his letter that the sheriff's department was made up of many individuals, several of which deserved some credit for solving the case. After balancing the factors set forth in *Pickering*, the Court concluded that the deputy's speech was not protected by the First Amendment.

In *Kannisto v. City and County of San Francisco*, 541 F.2d 841 (9th Cir. 1976), cert. denied, 430 U.S. 931 (1977), the Court held that the suspension of a lieutenant police officer for describing "his supervisor as a most 'unreasonable, contrary, vindictive individual', whose behavior was 'unreasonable, belligerent, arrogant, contrary and unpleasant.'", did not violate the lieutenant's First Amendment Rights. *Kannisto*, at 842. The Court noted that the lieutenant's statements "*can be presumed* to have had a substantial disruptive influence on the regular

operation of the department." *Kannisto*, at 844 (emphasis added). In weighing the competing interests, the Court held that the interest of the State outweighed the interest of the lieutenant and found that the statements were not protected by the First Amendment.

In *Wood v. Town of Frederica*, 529 F. Supp. 403 (D. Del. 1982), aff'd, 688 F. 2d 828 (3rd Cir. 1982), the trial court held that certain statements made by the Chief of Police were not protected by the First Amendment. The speech involved a letter written by the Chief to the State Judiciary Committee making a complaint that a local magistrate had a conflict of interest between his role as Justice of the Peace and his insurance practice. "The letter soon became a source of controversy." *Wood*, at 404. The Chief alleged that the Mayor elected not to renew the Chief's contract for employment due to the statements made in the letter and based upon the desire to disassociate himself from the Chief's actions.

In balancing the competing interests, the Court focused on the deteriorated relationship between the Mayor and the Chief and stated as follows:

> Not only did his activity impair his public service by rendering further working with the Mayor impossible, but the *relationship between Mayor and Police Chief in a small town is such that it requires personal loyalty and confidence.* The record reflects not only that Wood (Chief) and Nashold (Mayor) had this type of relationship prior to the Wooten (Magistrate) letter, but also that it had totally disintegrated by the time his contract was not renewed.

Wood, at 405. (Emphasis Added). Thus, the Court balanced the competing interests in favor of the Mayor and held that the speech was not protected by the First Amendment.

In *Hoopes v. Nacrelli*, 512 F.Supp. 363 (E.D. Pa. 1981), the Court held that the Mayor did not violate the Police Chief's First Amendment Rights by demoting the Police Chief to the rank of inspector based upon statements made by the Chief.

In *Hoopes*, the Chief testified against the Mayor in a federal criminal trial on corruption charges. Subsequent to his testimony, the Chief was demoted to the rank of inspector. Although the Chief was responsible for the day-to-day operations of the department, the Mayor had the ultimate power to fashion policies and procedures. The testimony of the Chief made headlines in the small town involved, and both the Mayor and Chief retained legal counsel during the pre-trial investigation.

The Chief contended that regardless of the relationship between the Mayor and the Chief, morale remained high within the police department and the department continued to function properly. In rejecting this argument, the Trial Court stated:

> Even assuming that Hoopes (Chief) could produce evidence in support of his contention at trial, this evidence would not be material. As the 3rd Circuit noted in *Sprague*, "the key question under *Pickering*. . . is whether the employment relationship has been seriously undermined." 546 F.2d at 566. Although Hoopes may have been able to continue running the police department, Nacrelli (Mayor) retained ultimate responsibility for it under the Third Class City Code and it was necessary for Nacrelli to have a police chief in whom he had confidence. In *Sprague*, the Court affirmed the District Court's dismissal and appeared to conclude that *it is simply a matter of common sense that a public official cannot function effectively when a subordinate has publicly questioned his veracity. See* 546 F.2d at 565. . . . It is completely unreasonable to suggest that an effective employment relationship could continue to exist under such circumstances and I accept Nacrelli's contention that Hoopes demotion was necessary if Nacrelli was to perform effectively his supervisory role over the police department. Therefore Nacrelli's motion for summary judgement on the First Amendment claims will be granted.

Hoopes, at 367-68. (emphasis added).

As can be seen from the foregoing, the Trial Court determined that the Chief's speech was not protected by the First Amendment and granted a summary judgment in favor of the Mayor and other members of the town council.

In *Magri v. Giarrusso*, 379 F.Supp. 353 (E.D. La. 1974), the Court held that a police sergeant's public criticism of the Police Superintendent was not protected speech under the First Amendment. The sergeant was also the union president. There was a rather lengthy history of public statements made by the sergeant which essentially questioned the veracity of the superintendent and whether the superintendent had the best interest of the policemen in mind in discharging his duties as superintendent. The Court noted that the resolution of the issue depended upon a balancing of conflicting interests and focused on the factors enunciated by the Court in *Pickering*. The Court concluded:

> It hardly needs pointing out that the superintendent needs the confidence and loyalty of his men in order to run an effective police department in order to maintain an efficient and disciplined force.

Magri, at 361. Thus, the Court held that the speech was not protected by the First Amendment and found the issues in favor of the superintendent.

The overwhelming weight of authority compels the conclusion that the statements of Joiner and Milner, although arguably a matter of public concern, are not protected by the First Amendment. It is undisputed that the statements made by Joiner and Milner led to a deterioration of the relationship between the Officers and the Councilmen, including Mayor Reid and the Chairman of the Police Department, Councilman Keith. Councilman Keith, of course, was delegated the responsibility of overseeing the operations of the police department and had the responsibility of setting policy and procedure. (R.T. 238-240, 338, 602). Councilman Keith was also the subject of the Officers' statements and the Officers them-

selves cailm that the relationship between Councilman Keith and the Officers deteriorated substantially following the statements made by the Officers. The Officers do not seriously dispute that the relationships deteriorated, but instead insist that they were nevertheless able to perform their job duties in an efficient manner. As noted by the Court in *Hoopes*, however, the Officers' contention is immaterial to the issue at hand. The fact that the relationships had deteriorated, coupled with the fact that the Town of Morris is a small town, and the police force must work closely with the Councilmen, Mayor and Police Chairman, is of paramount importance.

Each of the above-cited cases were cited to the Alabama Supreme Court which took notice of their presence, but refused to follow their rule.

> The Trial Court did not err in submitted to the jury the plaintiffs' 42 U.S.C. § 1983 claim alleging a violation of their right to free speech. (Citations omitted).
>
> ***We are aware that there are cases that might suggest a contrary result. See Morales v. Stierheim, 848 F.2d 1145 (11th Cir. 1988); Cooper v. Johnson, 590 F. 2d 559 (4th Cir. 1979); Kannisto v. City & County of San Francisco, 541 F. 2d 841 (9th Cir. 1976), cert. denied 430 U.S. 931, 97 S. Ct. 1552, 51 L.Ed. 2d 775 (1977); Wood v. Town of Frederica, 529 F. Supp. 403 (D.Del 1982), aff'd at 688 F.2d 828 (3d Cir. 1982); Hoopes v. Nacrelli, 512 F. Supp. 363 (E.D. Pa. 1981).***

Roberts v. Joiner, 590 So. 2d 195, 202 (Ala. 1991) (emphasis added).

Clearly, as the Alabama Supreme Court opinion in this case acknowledges, the decision in this case conflicts with legal precedent articulated by several United States Courts of Appeals and with legal precedent articulated by the United States Supreme Court.

CONCLUSION

The Alabama Supreme Court Opinion in this case clearly conflicts with legal precedent articulated by several United States Courts of Appeals and by the United States Supreme Court. Therefore, if this Court grants the Officer's original Petition for Certiorari Review, this Court should also grant this Cross Petition pursuant to United States Supreme Court Rule 10.1(b) and (c) and United States Supreme Court Rule 12.3.

Respectfully submitted,

C. PETER BOLVIG
Counsel of Record
McDANIEL, HALL, CONERLY
& LUSK, P.C.
1400 Financial Center
505 North 20th Street
Birmingham, AL 35203
205-251-8143

Attorney for Cross Petitioners